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Does a bank, in accepting for collection, in the ordinary course of business, a draft delivered to it, guaranty the solvency of the intermediate banks through which the draft passes? This was the question presented to the Appellate Court of Indiana, in Irwin v. Reeves Pulley Co., 48 N. E. Rep. 601. The question is not by any means a new one. It has arisen frequently in the courts and the cases, on the subject, seem to be in irreconcilable conflict. It was contended in that case that the question was not an open one in that State, and that it had been settled adversely to the bank upon the strength of the following cases, viz.: Tyson v. Bank, 6 Blackf. 226; Express Co. v. Haire, 21 Ind. 4; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; Chapman v. McCrea, 63 Ind. 360; Pollard v. Rowland, 2 Blackf. 22; Abbott v. Smith, 4 Ind. 452. But the court was of the opinion that these cases were not conclusive, and pointed out the distinction which might be drawn from them. The court held, reversing the trial court, that where plaintiff placed a draft with a bank for collection, it became the agent for plaintiff, for the collection and transmission of the draft, with implied authority to do whatever was reasonably necessary to accomplish the work; and if the bank exercised reasonable care in the selection of subagents necessarily employed to do the work, and seasonably transmitted the draft through such subagents to the place of payment, its whole duty was performed, and, in case of default of one of these subagents, it was not liable to plaintiff for the amount of the draft. Two of the members of the court dissented.

As before stated the authorities are all at sea on the question. The Indiana court cited the following cases as sustaining what is known as the Massachusetts rule, denying the liability of the bank, which proceeds upon the theory that as the collection of a draft at a distant point cannot be made by the bank itself through any of its officers, but must be intrusted to a subagent, the holder of the draft impliedly authorizes the bank to employ a subagent, and that the risk of the subagent's neglect is then upon the holder of the draft. Merchants' & Manufacturers' Bank v. Stafford Nat. Bank, 44 Conn. 565; Fabens v. Bank, 23 Pick. 330; Third Nat. Bank of Louisville v. Vicksburg Bank, 61 Miss. 112; Guelich v. Bank, 56 Iowa, 434, 9 N. W. Rep. 328; Bank of Louisville v. First Nat. Bank of Knoxville, 8 Baxt. 101; Bank v. Ashworth, 123 Pa. St. 212, 16 Atl. Rep. 596; Hum v. Bank, 4 Rob. (La.) 109; Wilson v. Smith, 3 How. 763; Lawrence v. Bank, 6 Conn. 521; Warren Bank v. Suffolk Bank, 10 Cush. 582; Planters' & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Wilmington, 75 N. C. 534; Daly v. Bank, 56 Mo. 94; Ætna Ins. Co. v. Alton City Bank, 25 Ill. 221; Drovers' Nat. Bank v. Anglo-American Packing & Prov. Co., 117 Ill. 100, 7 N. E. Rep. 601; Stacey v. Bank, 12 Wis. 629; Bank v. Howell, 8 Md. 530; Bank v. Goodman, 109 Pa. St. 422, 2 Atl. Rep. 687; Hyde v. Bank, 17 La. 560; Bank v. Burns, 12 Colo. 539, 21 Pac. Rep. 714; Bank v. Ober, 31 Kan. 599, 3 Pac. Rep. 324; Milling Co. v. Kuenster (Ill.), 41 N. E. Rep. 906; Trust Co. v. Newland (Ky.), 31 S. W. Rep. 38; Bank v. Sprague (Neb.), 51 N. W. Rep. 846; Bank v. Triplett, 1 Pet. 25, decided by Marshall, C. J.

On the other hand the case of Allen v. Bank, 22 Wend. 215, firmly established the contrary doctrine in the State of New York. That decision was by an almost evenly divided court, fourteen of the members being upon one side, and ten upon the other. Mr. Freeman has this to say of the decision, in a note following the principal case: "The preponderance of authority is against the doctrine of the principal case, and in favor of the rule that the liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the defaults of the correspondent, when due care has been used in making the selection of such correspondent." 34 Am. Dec. 315. The rule adopted in the

case of Allen v. Bank, *supra*, was adopted by the Supreme Court of the United States in the case of Hoover v. Wise, 91 U. S. 308, with Justices Miller, Clifford, and Bradley dissenting. The same rule was adopted by divided courts in the States of New Jersey and Ohio; and, while Michigan has adopted the same rule, an eminent member of the bar of that State, in his valuable work on Agency, takes strong ground against it, and concludes that it is against the great weight of authority in this country. Mechem, Ag. § 514. The dissenting judges in the Indiana case, however, argue in favor of the New York rule as followed by the Supreme Court of the United States and cite the following cases as sustaining the doctrine that the correspondent bank is the agent of the home bank and not the agent of the owner of the paper, viz., Davey v. Jones, 42 N. J. Law, 28; Allen v. Bank, 22 Wend. 215; Ayrault v. Bank, 47 N. Y. 570; Castle v. Bank, 148 N. Y. 122, 42 N. E. Rep. 518; St. Nicholas Bank of New York v. State Nat. Bank, 128 N. Y. 27, 27 N. E. Rep. 849; Naser v. Bank, 116 N. Y. 498, 22 N. E. Rep. 1077; Corn Exch. Bank v. Farmers' Nat. Bank of Lancaster, Pa., 118 N. Y. 443, 23 N. E. Rep. 923; Hoover v. Wise, 9 1U. S. 308; Bank v. Burns, 12 Colo. 539, 21 Pac. Rep. 714; Bank v. Beal, 50 Fed. Rep. 355; Bank v. Craig (Kan. App.), 42 Pac. Rep. 830; Thompson v. Bank, 3 Hill (S. C.), 77; Power v. Bank, 12 Pac. Rep. 597, 6 Mont. 251; Simpson v. Waldby, 63 Mich. 439, 30 N. W. Rep. 199; National Citizens' Bank of New York v. Citizens' Nat. Bank of Raleigh (N. C.), 25 S. E. Rep. 971; Bailie v. Bank (Ga.), 21 S. E. Rep. 717; Reeves v. Bank, 8 Ohio St. 465; Hermann v. Bank, 10 Ohio St. 446; Streissguth v. Bank, 43 Minn. 50, 44 N. W. Rep. 797; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Davey v. Jones, 42 N. J. Law, 28; Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 212.

NOTES OF IMPORTANT DECISIONS.

NATIONAL BANK SHARES — LIABILITY OF HOLDER AS TRANSFERRER — INSOLVENCY.—In Stuart v. Hayden, Receiver, the Supreme Court of the United States has recently passed upon some interesting questions as to the liability of the holders of national bank stock as transferrers. They decide that one who holds shares of national bank stock—the bank being at the time insolvent—cannot escape the individual liability imposed by the statute by transferring his stock with the intent simply to avoid that liability, knowing or having reason to believe that at the time of the transfer on the books of the bank that it is insolvent or about to fail. A transfer with such intent and under such circumstances is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee.

The right of creditors of a national bank, they say, to look to the individual liability of shareholders to the extent indicated by the statute for its contracts, debts and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and the creditors to look to the person to whom his stock has been transferred.

If the bank be solvent at the time of the transfer, that is, able to meet its existing debts, contracts and engagements, the motive with which the transfer is made is, of course, immaterial. But if the bank be insolvent the receiver may, at least without suing the transferee and litigating the question of his liability, look to those shareholders who knowing or having reason to know at the time that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them.

Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts and engagements if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which in the view the court takes of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.

CONSTITUTIONAL LAW — POLICE POWER — RAILWAY CROSSINGS — HIGHWAYS — CATTLE GUARDS.—In Chicago, M. & St. P. Ry. Co. v. City of Milwaukee, 72 N. W. Rep. 1118, decided by the Supreme Court of Wisconsin, an important case on the subject of railway crossings and the maintenance of cattle guards by railroad companies, the following are the points decided:

1. Corporations are subject to such reasonable police regulations as the legislature may see fit, from time to time, to adopt to promote public health, morals and safety; also to the reserved power under the constitution to alter or amend corporate charters.

2. Compliance with valid police regulations and changes in corporate charters are not subjects for compensation. They are not violations of the inhibitions of the constitution upon the impairment of the obligations of contracts, or the deprivation of property without due process of law, or of the equal protection of the laws.

3. Legislative authority, under the police power

of the State, extends to all matters necessary to a safe crossing of a railway track by a highway, and without regard to whether exercised before or after the construction of the railroad, or before or after the construction of the highway, or whether the highway existed at the time of the construction of the railroad, or was thereafter constructed across it.

4. The requirement for the construction and maintenance of cattle guards, warning posts, crossing signs, crossing gates, and the planking of tracks are equally proper subjects for police regulations when the legislature shall see fit to exercise its authority in that regard.

5. The statute of this State (section 1836, Rev. St.), in regard to the restoration of highways crossed by railroads, does not apply to a highway constructed after the construction of the railroad which it crosses.

6. Section 1809, Rev. St., in regard to crossing signs, and section 1810, Rev. St., in regard to the construction and maintenance of cattle guards, apply to all railroads without respect to when constructed.

7. Where a new highway is laid out and opened across a railway track, the railway company is entitled to compensation for the diminished value of its easement in the land, on account of the establishment of the new way, and the cost of making and maintaining such structural changes in its road bed and track as become necessary in order to protect and preserve its track for the old use, notwithstanding the new use, except, however, such changes as are required by law under the police power of the State or the constitutional reservation of power to alter or amend corporate charters.

8. Such structural changes include planking of the track and maintaining the same, but do not include the removal of the planking from time to time to enable the railway company to do the necessary tamping, and to remove snow and ice from between the rails, the latter being mere operating expenses and too conjectural to form any basis for compensation. They do not include crossing gates; they are not structural changes in the track, and are not a necessary part of crossing construction.

CONFLICT OF LAWS—CONTRIBUTORY NEGLIGENCE.—In the decision of Louisville & N. R. Co. v. Whitlow's Admr., 43 S. W. Rep. 711, decided by the Court of Appeals of Kentucky, it appeared that plaintiff's decedent was killed in Tennessee, where contributory negligence will not defeat the action, but goes in mitigation of damages only, and the action for damages for the injury was brought in Kentucky, where contributory negligence will defeat such action. It was held that the liability for damages is governed by the laws of Tennessee. The court said that "the law of Tennessee must govern in fixing the liability and the *quantum* of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability; then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instant adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this State, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that State allowing such a plea was not available as a defense because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. Bruce's Admr. v. Railroad Co. was an action under the Tennessee statute. The court said: "We are of the opinion the action cannot be maintained and recovery had in this State in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the State of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the plaintiff cannot recover in the same manner and to the same extent as if the action had been brought in Tennessee. Railroad Co. v. Graham's Admr., 98 Ky. 688, 34 S. W. Rep. 229, was an action under the statute of Alabama for a negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama Supreme Court, should be applied in the case. The case of Johnson v. Railroad Co., 91 Iowa, 248, 55 N. W. Rep. 66, is cited by counsel for appellant to sustain his contention that Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. Knight v. Railroad Co., 108 Pa. St. 250, and Herrick v. Railroad Co., 31 Minn. 11, 16 N. W. Rep. 413, are cited by the court to sustain its conclusions. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in Knight v. Railroad Co. presents the right to maintain an action against a foreign corporation

to recover damages in an action *ex delicto* for negligence causing the death in another State. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of Herrick v. Railroad Co., and the court, in the latter case, said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced. * * * The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." Of course there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. Dennick v. Railroad Co., 103 U. S. 11, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this State, cannot be applied so as to alter or affect the right of action which arose in Tennessee." In addition to the cases cited by the court, see the late case of Turner v. St. Clair Tunnel Co., 70 N. W. Rep. 146.

MODERN VIEW OF THE NATURE OF DEPOSITS.

Deposit as Known to the Common and Civil Law.—A deposit, as known to the civil law and thence to the common law, was called in latinized phraseology, *depositum*;[1] and an essential characteristic of the contract, emphasized in the cases, was the gratuitous character of the keeping which it involved.[2] This kind of transaction was often classed as a bare and naked bailment,[3] and is sometimes designated as a mere or simple deposit.[4] Such modes of characterization are presumably designed to indicate that the property was delivered purely for custody and not by way of security, like a pledge, or to have something done thereto, in the way of work, transportation, or the like. A deposit, in this sense, is variously defined.[5] One of the most familiar definitions declares a deposit to be a naked bailment of goods to be kept without recompense, and to be returned when the bailor shall require it.[6] Another definition describes a deposit as a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of

[1] See Foster v. Essex Bank, 17 Mass. 479, at p. 498, or 9 Am. Dec. 168, at pp. 170-71; Morris v. Lewis' Execr., 33 Ala. 55; Coggs v. Bernard, 2 Ld. Raym. 909, at pp. 912-13, or 1 Smith's Lead. Cas. (9th Am. Ed.) 354, at p. 359. The English word was formerly spelled with an additional *e* at the end, as is seen in cases like Kentucky v. Wister, 2 Peters (U. S.), 318, at p. 325; Catlin v. Savings Bank, 7 Conn. 487, at p. 494; Richardson v. Futrell, 42 Miss. 525, at p. 544; and Coffin v. Anderson, 4 Blackf. (Ind.) 395, at pp. 403-4. Often the thing which is the subject of a deposit is itself called a deposit, and the place where it is put is sometimes called a depository.

[2] Morris v. Lewis' Exer., 33 Ala. 53, at p. 55. See Coggs v. Bernard, 2 Ld. Raym. 909, at p. 913, or 1 Smith's Lead. Cas. (9th Am. Ed.) 354, at p. 360; Durnford v. Seghers' Syndics, 9 Mart. (La.) 470, at p. 472.

[3] As in the case just cited of Coggs v. Bernard, 2 Ld. Raym. 909, at p. 912, or 1 Smith's Lead. Cas. (9th Am. Ed.) 354, at p. 359. See also Payne v. Gardiner, 29 N. Y. 146, at p. 167; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377, at p. 380; Rozelle v. Rhodes, 116 Pa. St. 129, at p. 137, or 2 Am. St. Rep. 591, at p. 595.

[4] As in Foster v. Essex Bank, 17 Mass. 479, at pp. 499, 501, or 9 Am. Dec. 168, at pp. 171, 173.

[5] The person who makes a deposit, or the bailor, is called a depositary. See Thompson v. St. Louis & S. F. Ry. Co., 59 Mo. App. 37, at p. 40; Kincheloe v. Priest, 89 Mo. 240, at p. 243; Wiser v. Chesley, 53 Mo. 547, at p. 550. The person to whom the deposit is made is sometimes called the depositee (as in Bucher v. Commonwealth, 103 Pa. St. 528, at p. 534), but more commonly a depositary, as in Richardson v. Futrell, 42 Miss. 525, at p. 544; Schmidt v. Blood, 9 Wend. (N. Y.) 268, at p. 271, or 24 Am. Dec. 143, at p. 144; Thompson v. St. Louis & S. F. Ry. Co., 59 Mo. App. 37, at p. 40; Wiser v. Chesley, 53 Mo. 547, at pp. 549-50.

[6] Payne v. Gardiner, 29 N. Y. 146, at p. 167; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377, at p. 380. See also the indication of like ideas in Foster v. Essex Bank, 17 Mass. 479, at p. 498, or 9 Am. Dec. 168, at pp. 170-71; Morris v. Lewis' Execr., 33 Ala. 53, at p. 55; Gray v. Merriam, 148 Ill. 179, at p. 186, or 39 Am. St. Rep. 172, at p. 176, or 32 Lawy. Rep. Ann. 769, at p. 772; Smith v. Nashua & Lowell R. R., 27 N. H. 86, at p. 90, or 59 Am. Dec. 364, at p. 365.

the original trust.[7] Nor are various other judicial characterizations of a deposit lacking.[8] It will be noticed that the divergencies in these definitions and characterizations largely correspond with the different views which have prevailed concerning the nature of a bailment.

More Comprehensive Modern Sense of Term.—More comprehensively, in accordance with modern ideas, deposit may be described as a species of bailment, whereby personal property in corporeal form is placed in charge of a party to keep it safely in his custody and return it upon demand, to the party who delivered it to him or in accordance with the directions of such person. It will be noticed that this description differs from those already given, chiefly in two particulars: first, in regard to the subject-matter of the bailment, and secondly, in regard to the gratuitous character of the bailment. Under the first head, it may be observed that the definitions before given speak of the subject of the deposit as "goods," and sometimes "movables" is the term used instead, where the more comprehensive word "thing" is not employed. But in the first place, "thing" might be thought to include other than personal property, and the other terms, in vogue under the common or the civil law, do not fully express the modern idea that the subject of the deposit may be any personal property, provided it is either corporeal or is the corporeal representative of incorporeal property, like a note or a bond or other paper of the class commonly called "securities." Under the second head the gratuitous character of the bailment has been seen, as the definitions indicate, to be regarded as essential to a deposit as known to the common and civil law. But in modern times we are sufficiently familiar with compensated deposits, like those made with safe deposit companies, wharfingers, or warehousemen.[9] From these instances it will be seen that the class of compensated deposits is, now-a-days, sufficiently common and important, without taking into account cases where private individuals, as distinguished from persons following any of the pursuits just named, are paid for the safe-keeping of articles deposited with them.[10] Furthermore, even a modification of the definition just given would be requisite if we accept as representing the tendency, if not the weight of modern authority, the cases[11] which hold that the bailor may, at his risk, deliver to the rightful owner instead of the bailor, and sometimes[12] insist that he must do so at his peril. It would, on this basis, be necessary to qualify the description of a deposit in its modern aspect, given at the beginning of the present subdivision, by adding the words

[7] Montgomery v. Evans, 8 Ga. 178, at p. 180; Richardson v. Futrell, 42 Miss. 525, at p. 544.

[8] Thus a deposit "properly so called" is stated to be a naked bailment, such as exists where one of the contracting parties gives something to keep to the other, who is to do so gratuitously, and obliges himself to return it *in individuo* when he shall be requested: Rozelle v. Rhodes, 116 Pa. St. 129, at p. 137, or 2 Am. St. Rep. 591, at p. 595. The Civil Code of France also declares that a deposit is in general an act by which a person receives the thing of another person, with the obligation to keep it and to return it in kind. See Cachard's Eng. Ed. of 1895, p. 429, art. 1915. So it is said that in the strict meaning of the word, borrowed from the civil law, deposit is the delivery of a thing for custody, to be redelivered on demand, without compensation: Nat. Bank of Fort Edward v. Washington County Nat. Bank, 5 Hun (N. Y.), 605, at p. 607.

[9] See, as to the functions of a warehouseman in this aspect, Bucher v. Commonwealth, 103 Pa. St. 528, at p. 534; Schmidt v. Blood, 9 Wend. (N. Y.) 268, at p. 271, or 24 Am. Dec. 143, at p. 144, with extended note on warehousemen at pp. 145-60. Deposits of grain for storage with warehousemen are discussed in Hall v. Pillsbury, 43 Minn. 33, at pp. 34, 33, or 7 Lawy. Rep. Ann. 529, at pp. 531-33, with notes at pp. 529-32; and in cases like Sexton v. Graham, 53 Iowa, 181, at pp. 187-88; Nelson v. Brown, 53 Iowa, 555, at pp. 556-58; Woodward v. Semans, 125 Ind. 330, at pp. 331-32, or 21 Am. St. Rep. 225-26; and like deposits of other merchandise in First Nat. Bank v. Providence Warehouse Co., 17 R. I. 112-17, or 9 Lawy. Rep. Ann. 260. In regard to the liability of wharfingers see Cox v. O'Riley, 4 Ind. 368, at p. 371, or 58 Am. Dec. 633, at p. 635.

[10] Probably it could hardly be said at the present day, as was declared by one of our State courts in 1853, that the "ordinary case of a deposit is where the owner of goods delivers them to another, to be kept for him, without any agreement expressed or reasonably to be implied that the person to whom they are delivered shall receive any compensation for his services or care." Yet it must be acknowledged that this statement, put forth in Smith v. Nashua & Lowell R. R., 27 N. H. 86, at p. 90, or 59 Am. Dec. 364, at p. 365, was apparently made to bring out the voluntary character of the delivery rather than the want of compensation.

[11] Like those mentioned in Shellenberg v. Fremont, etc., R. R. Co., 45 Neb. 487, at pp. 490-91, or 50 Am. St. Rep. 561, at pp. 562-63. See also Kohn v. Richmond & Danville R. R. Co., 37 S. Car. 1 at pp. 2-7, or 34 Am. St. Rep. 726-31, with note on common carriers and adverse claimants, at pp. 731-36, or 24 Lawy. Rep. Ann. 100-102; Fitch v. Newberry, 1 Dougl. (Mich.) 1, at pp. 5-18, or 40 Am. Dec. 33, at pp. 34-44, with note at pp. 44-45.

[12] As in Shellenburg v. Fremont, etc. R. R. Co., just cited, 45 Neb. 487, at pp. 491-93, or 50 Am. St. Rep. 561, at pp. 563-64.

"or to give up such property to the person who has the paramount right thereto." Finally, another charge would be requisite if the term "deposit" be deemed broad enough as it is under the statutes of several States, and sometimes in the view of a State court,[13] to cover what are termed "involuntary deposits," such as arise from finding or where goods which have been forwarded are not called for. On that basis it would be necessary to still further modify the description just mentioned, so as to convey the idea that the property has come into the charge of the bailee without being delivered to him for safe-keeping, and leave out the idea that it is to be returned, substituting some phraseology to the effect that it is to be given up to the party having the paramount right thereto.

Kinds of Deposits.—Deposits, as known to the civil law, may, in the first place, be distinguished as regular deposits, the latter, as recognized in Louisiana, arising when one deposits money with another for safe-keeping in cases where the latter is to return, not the specific money deposited, but an equal sum.[14] Even in other States where the civil law does not prevail, recognition seems sometimes to be given to the existence of such a class of deposits as irregular deposits.[15] Another distinction, quite unknown to the common law, but recognized under the civil law as it prevails in Louisiana, is that between a necessary deposit, compelled by some accident, such as fire, shipwreck, or other casualty, and which includes the deposits a traveler must make with an innkeeper or steamboat captain of articles which such traveler could not safely or prudently retain in his custody, and a voluntary deposit, which is made with the consent of the parties concerned.[16] Another distinction made in the same jurisdiction is between deposits, properly so called, and conventional or judicial sequestrations, or a kind of deposit, made with or without the order of a judge, of the thing in litigation to an indifferent person. The first named kind of sequestration applies to those who are mere stakeholders.[17] There is also a statutory classification of deposits adopted in other States than Louisiana. Thus in California, as well as in the Dakotas and Montana, there are distinctions between voluntary and involuntary deposits, the latter somewhat like the necessary deposits of the civil law, between deposits for safe-keeping and for exchange, the latter somewhat like the irregular deposits of the civil law, as applied to other articles besides money, and, in effect, between gratuitous deposits and those for hire, called storage.[18]

General and Special Deposits. — An especially important distinction in its relation to the present subject, is that between general and special deposits. A special deposit is a deposit of articles to be returned substantially as they were delivered. This is what we ordinarily mean by a deposit; but the designation "special deposit" is particularly employed to indicate a deposit of articles of slight bulk and special value, commonly called "valuables," to be safely kept and duly returned. A general deposit, on the other hand, is a deposit where articles of the same kind merely, and not the identical articles, are to be returned. A notable instance is seen in the case of money,[19] which may be mingled with other funds, and where

[13] As in Smith v. Nashua & Lowell R. R., 27 N. H. 86, at pp. 90-91, or 59 Am. Dec. 364, at pp. 365 66.

[14] See Gordon & Gomilla v. Muchler, 34 La. Ann. 604, at pp. 607-8; Brown v. Pike, 34 La. Ann. 576, at p. 577; Cousins v. Kelsey, 33 La. Ann. 880, at p. 881; Matthews v. McKenzie, 10 La. Ann. 342-44; Durnford v. Seghers' Syndics, 9 Mart. (La.) 470, at pp. 484-89. It is abundantly settled in Louisiana jurisprudence that no compensation is given on such deposits. Gordon & Gomilla v. Muchler, *supra*; Hancock v. Citizens' Bank, 32 La. Ann. 590, at p. 592; Murdock & Williams v. Citizens' Bank, 23 La. Ann. 113, at p. 116; Morgan v. Lathrop, 12 La. Ann. 257, at pp. 258-59; Bogert v. Egerton, 11 La. Ann. 73; Breed v. Penvis, 7 La. Ann. 53-54; Nolan v. Shaw, 6 La. Ann. 40, at p. 46; Bloodworth v. Jacobs, 2 La. Ann. 24, at pp. 27-28.

[15] See Rozello v. Rhodes, 116 Pa. St. 129, at p. 137, or 2 Am. St. Rep. 591, at p. 595; Chase v. Washburn, 1 Ohio St. 244, at p. 249, or 59 Am. Dec. 623, at p. 626, [illegible] which, however, should be compared Kellogg v. [illegible] 26 Ohio St. 15, at p. 18.

[16] See Dunn v. Branner, 13 La. Ann. 452, at p. 454; La. Civ. Code of 1889, arts. 2932-36 at p. 523, and arts. 2964-71 at pp. 527-28. Under the French Civil Code, the distinction of like character is between voluntary and obligatory deposits. Cachard's Eng. Ed. of 1895, pp. 430-31, 435, arts. 1920-26, 1949-54.

[17] See Lafarge v. Morgan, 11 Mart. (La.) 462, at p. 467; La. Civ. Code of 1889, arts. 2926-27, at p. 522, and arts. 2972-81, at pp. 528-30; Lannes v. Courege, 31 La. Ann. 74, at p. 76. For the like distinction under the French Civil Code, see Cachard's Eng. Ed. of 1895, pp. 429, 436-37, arts. 1916, 1955-63.

[18] See Cal. Civ. Code, §§ 1814-15, 1816-17, 1844, 1851; Dak. Civ. Code, §§ 1034-35, 1037-38, 1053, 1057, in Dak. Codes pp. 958, 960, 961; Mont. Civ. Code, §§ 2441-42, 2444-45, 2480, 2490.

[19] See Mutual Accident Assn. v. Jacobs, 43 Ill. App. 340, at p. 346, affirmed in 141 Ill. 261, at p. 267; Talladega Ins. Co. v. Landers, 43 Ala. 115, at p. 138.

the particular coins or currency given need not be restored. Both designations are especially applied to deposits in banks.[20] The statement sometimes made[21] that a deposit is general unless the depositor makes it special, or deposits it expressly in some particular capacity,[22] sounds well, but is open to the objection that it requires explanation and expansion. The resemblance of the distinction between special and general deposits to that between a regular and an irregular deposit under the civil law, will at once be perceived. The limits of the present article will not permit, however, the development of this resemblance,[23] or the discussion of the question what effect the occupation of the depositary, if different from that of a banker, has upon the point whether the deposit is a general or a special one,[24] or the consideration of the effect of the sealing or closing up of deposits as determining their nature in this aspect.[25] The same may be said of the question coming under a more general head, as to how far a deposit or bailment can be said to be compensated because it is made with a person or organization following a gainful pursuit.[26]

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[20] A general deposit of money with a person other than a banker, is explained in accordance with what is here said, in Shaemaker or Shoemaker v. Hinze, 53 Wis. 116, at p. 117. Special deposits in banks are especially considered in Foster v. Essex Bank, 17 Mass. 479, at pp. 502-7, or 9 Am. Dec. 168, at pp. 174-77. Both kinds are considered in Marine Bank of Chicago v. Ruchmore, 28 Ill. 463, at p. 471, and Marine Bank of Chicago v. Chandler, 27 Ill. 525, at p. 547; also, in Boyden v. Bank of Cape Fear, 65 N. Car. 13, at pp. 16, 19; Keene v. Collier, 1 Met. (Ky.) 415, at p. 417; Matter of Franklin Bank, 1 Paige (N. Y.), 249, at pp. 253-54. Concerning the liabilities arising from special deposits with banks, see Gray v. Merrian, 148 Ill. 179, at pp. 185-91, or 39 Am. St. Rep. 172, at pp. 175-80, or 32 Lawy. Rep. Ann. 769, at pp. 771-73, with note on pp. 769-76; Preston v. Prather, 137 U. S. 604, at pp. 607-12, or 34 Lawy. Co-op. Ed. 788, at pp. 789-91.

[21] As in Braham v. Adkins, 77 Ill. 263, at p. 264. See also Ward v. Johnson, 95 Ill. 215, at p. 241.

[22] See, as to this latter phrase, Star Cutter Co. v. Smith, 37 Ill. App. 212, at p. 217.

[23] As recognized in State v. Clark, 4 Ind. 315, at p. 316. Concerning general and special deposits with banks, the distinction between them, and the presumptions favorable to each class, see Wright v. Paine, 62 Ala. 340, or 34 Am. Rep. 24, at p. 25; Foster v. Essex Bank, 17 Mass. 479, at pp. 503-5, or 9 Am. Dec. 168, at pp. 174-76; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94, at pp. 100-101; Dawson v. Real Estate Bank, 5 Ark. 283, at p. 297.

[24] See Wright v. Paine, 62 Ala. 340, or 34 Am. Rep. 24, at pp. 26, 27; Duncan v. Magette, 25 Tex. 246, at pp. 247-49; Derrick v. Baker, 9 Port. (Ala.) 362, at pp. 363-66.

[25] See Dawson v. Real Estate Bank, 5 Ark. 283, at p. 297; Grimes v. Booth, 19 Ark. 224, at p. 227.

[26] See, especially on this subject, Prince v. Alabama State Fair, 106 Ala. 340, at pp. 344-46, or 28 Lawy. Rep. Ann. 716-17; Woodruff v. Painter, 150 Pa. St. 91, at p. 97, or 16 Lawy. Rep. Ann. 451, at p. 453, or 30 Am. St. Rep. 786.

PARENT AND CHILD—ACTION FOR SERVICES—DEATH—LIMITATION OF ACTIONS.

FRAZIER v. GEORGIA RAILROAD & BANKING CO.

Supreme Court of Georgia.

1. In an action brought by the father of a minor son, capable of rendering service, for the negligent homicide of the latter, he is entitled, in a proper case, to recover *per quod servitum amisit.*

2. While, to recover, it is necessary to show both the negligent homicide and loss of service, the latter, being the source of damages as to the father, is the gravamen or gist of the action, and the rights of the parties are to be established by the law applicable under such circumstances in the relation of master and servant.

3. The master has a property right in the services of his servant, and a loss of service is, in legal effect, a damage to his personal estate; and the law limiting the time in which actions to recover for injuries to personalty may be brought limits the right of action in such a case.

LITTLE, J.: 1. An examination of the record shows that the demurrer filed was based upon two grounds: (1) That the tort complained of did not occur within two years next preceding the bringing of the plaintiff's suit, and (2) because the declaration sets forth no valid legal cause of action against the defendant. The only question, however, which we find it necessary to decide here is that of the statute of limitations. This involves the inquiry only whether the action instituted by the plaintiff is for injuries done to the person, and to be brought within two years after the right of action accrues, under section 3900 of the Civil Code, or whether it should be treated as an action for injuries to personalty, as claimed by the plaintiff, and therefore not barred until four years after the right of action accrues. The petition is filed by the father, alleging the wrongful homicide of his son, aged 14 years, by the servants and agents of the defendant engaged in the running and operation of its trains. It may be well to consider in the determination of this question the basis of the father's right to recover when he shall have made out a proper case. Section 3816 of the Civil Code provides that every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant. This section is simply declaratory of the common law. Bell v. Railroad Co., 73 Ga. 520. At common law the parent's right to recover is, by legal fiction, predicated upon the relation of master and serv-

ant. Wood, Mast. & S. p. 449, and authorities cited under note 3; Cooley, Torts (2d Ed.), p. 268; 1 Jagg. Torts, pp. 451, 461, and authorities cited in note 23. The action is, at common law, limited to the recovery of damages for loss of the child's services. Cooley, Torts, p. 268, and authorities cited in note 4; 5 East, 45; 6 East, 391; 11 East, 23; T. Raym. 259; 1 Jagg. Torts, p. 451; Wood, Mast. & S. pp. 444, 445, quoting from Lord Coke, and citing authorities, at footnote 1. The decisions of our court are in entire harmony with the principles of the common law on this subject. Bell v. Railroad Co., 73 Ga. 520, *supra;* Railroad Co. v. Harrison, *Id.* 744; Shields v. Yonge, 15 Ga. 356; Allen v. Railroad Co., 54 Ga. 503; Chick v. Railroad Co., 57 Ga. 357; McDowell v. Railroad Co., 60 Ga. 320. Shields v. Yonge, 15 Ga. 349, 356, *supra*, is one of the earliest of our cases, and this court there held that a father may sue for injuries to his minor son as for injuries to his servant, if the son is old enough to render service. The case of Allen v. Railroad Co., 54 Ga. 503, recognized the same right of action in the parent, but ruled, however, that if the child was incapable of rendering any service at the time the tort was committed, no recovery could be had. In the case of Chick v. Railroad Co., 57 Ga. 357, the same doctrine was enunciated, and in the case of McDowell v. Railroad Co., 60 Ga. 320, this court ruled that, while a father could not recover for the homicide of his minor daughter, he could recover for the loss of her service to the time of her majority, occasioned by such homicide. So that we can safely say that in a proper case-made the father of a minor son capable of rendering service may recover damages for the loss of service which he has sustained in consequence of the negligent homicide of the son.

2, 3. The form of the action to be brought under the common law was trespass *vi et armis*, *per quod servitum amisit;* that is, that the defendant has by force committed a trespass upon the person of the child, whereby the plaintiff has sustained the loss of his service. While, to recover, it is necessary to show both the negligent homicide and the loss of service, it is the loss of service which is the source of damage to the plaintiff. 2 Bl. Comm. bk. 3, top p. 142, par. 4, says: "In this case (referring to a tort committed on the servant), besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass *vi et armis*, in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitum amisit*, and then the jury will make him a proportionable pecuniary satisfaction," in line with which, in Robert Mary's Case, 9 Coke, 113*a*, Lord Coke lays down the rule to be: "If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is that the master hath not any damage by the personal beating of his servant, but by reason of a *per quod*, viz., *per quod servitum amisit*, * * * for, be the battery greater or less, if the master does not lose the service of his servant, he shall not have an action." In the same case Lord Coke says: "So that the original act is not the cause of his action, but the consequence upon it, viz: the loss of service is the cause of his action." The gist of the action is the loss of service. Wood, Mast. & S. p. 449, and authorities cited in notes 2, 3. The same doctrine is announced in Bigelow, Torts, 108, 109; 1 Minor, Inst. 224, and authorities cited. The wrong consists in actual damage by reason of loss of service or capacity to serve. 1 Jagg. Torts, 450; Knight v. Wilcox, 14 N. Y. 413. In the case of Allen v. Railroad Co., 54 Ga. 503, it was held that no recovery could be had by the father, because, while there was a homicide, there was no loss of service. The foundation of the plaintiff's action in a case like this is to recover damages for the loss of the service of the son, and not for the homicide. Fluker v. Banking Co., 81 Ga. 461, 8 S. E. Rep. 529. In the case of an actual parent, the loss of his service is the legal foundation of the action. 11 East, 23. By the common law, to entitle the parent to recover damages for a tort done to his child, the gist of the action is the loss of the services of the child by the parent. Allen v. Railroad Co., 54 Ga. 505. In pleading, "gist" means the essential ground or object of the action in point of law, without which there would be no cause of action. 1 Bouv. Law Dict. p. 712. The gist of action is the cause for which an action will lie, the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, and without which there is not a cause of action. And. Law Dict. p. 488; Bank v. Burkett, 101 Ill. 394; *In re* Murphy, 109 Ill. 33. We have cited the above authorities for the purpose of demonstrating the proposition that in all cases brought by a father to recover damages for a tort committed on his son, who was capable of rendering service, the gist of the action is the loss of the service to the father. The right of the servant for the battery, and the right of the master to recover for loss of service, are separate and distinct rights, and cannot be joined. Cooley, Torts, top p. 269; Rogers v. Smith, 17 Ind. 323. Notwithstanding an action has been brought in behalf of a child to recover damages for injuries sustained by reason of a tort committed on the person of the child, the father may recover for himself for loss of service. Wood, Mast. & S. § 227; 2 Thomp. Neg. 1260; Evansich v. Railway Co., 57 Tex. 123; Wilton v. Railroad Co., 125 Mass. 130; Railroad Co. v. Miller, 49 Tex. 322. In the case of Fried v. Railroad Co., 25 How. Prac. 285, in a review of rights of action under the statute which do or do not survive and go to the executor or administrator, Mr. Justice Masten says: "If, upon legal rules, injury to the person is the gist of the action, an injury to property or to pecuniary inter-

ests is merely matter of aggravation, the right of action dies with the person. But if, upon legal principles and analogies, the gist of the action can be injury to the property or to pecuniary rights or interests, the right of action is transmitted to the personal representative, who may recover to the extent that the wrong touched the estate of the deceased. If the authorities heretofore cited are applicable to a case of this character they establish the proposition that in a suit for the negligent homicide of a minor son who is capable of rendering service, brought by the father in his own behalf, the basis of the action is the damage to the father; that the damage to the father consists alone in the loss of service; and that, to recover in such action, it is necessary to show both the homicide or injury and the loss of service, because the latter, so far as the father's rights are concerned, grows out of, and is a consequence of, the homicide or injury. If the loss of service is the damage to the father, then it is the gravamen or gist of the action, and the right of the father to the service which he has lost is to be determined by the laws applicable in the relation of master and servant. A master has a property right in the services of his servant, otherwise he would not be entitled to recover damages for an invasion of such right. It has been held that an action by a husband to recover damages sustained in consequence of injuries inflicted upon his wife by the defendant's negligence, where such damages consist in the loss of the services of his wife, and of moneys expended for necessary medical aid and attendance upon her during her illness, etc., is an action to recover damages for an injury to property, and not for a personal injury. Groth v. Washburn, 34 Hun, 510; Cregin v. Railroad Co., 19 Hun, 341; *Id.* 83 N. Y. 595; *Id.* 75 N. Y. 192; Maxon v. Railroad Co., 48 Hun, 172. The ruling in the last case cited (48 Hun, 172) was reversed in 112 N. Y. 559, 20 N. E. Rep. 544, the reversal, however, being placed largely on the New York statutes, and interpretations thereof justified by reference to various sections of the New York Code. These authorities go to show that the nature of the right of the father is a property interest. If it is a property interest, it inures to him and his estate in the same manner as any other interest in property recognized by law, and existing in any other way. In the action brought in the present case the father cannot be compensated for the personal suffering of the child, or for any loss occasioned to him by diminution to his capacity in any respect, or any disability created by the effect of the injury sustained upon his health, which would necessarily enter into the composition of an award of damages for the personal injury. Groth v. Washburn, 34 Hun, 510. The plaintiff had a right to the services of his child. They were of pecuniary value to him, and any wrong by which he was deprived of those services was a wrong done to his property rights. Cregin v. Railroad Co., 75 N. Y. 195. In such an action the homicide is stated as an element only of the plaintiff's case, and by which damages resulted from the loss to the plaintiff of the child's services. Where an injury is done to the person of the plaintiff, the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists of injury to the person, and the damages are the consequence merely of that injury. *Id.* As has been shown, the parent or master has no right of action for the battery or homicide of the child or servant. No right of his is invaded or infringed, unless by the infliction of the injury he sustains the loss of service of the child or servant to which he is entitled. It would be an anomaly to hold that a master has no right of action for personal injuries to his servant, but that, nevertheless, the action for loss of service which is afforded him is an action for injury done to the person. The right of the master to the service of his servant is an incorporeal hereditament. Personalty or personal estate includes everything having value inherent in itself, or the representative of value, and not included in the definition of realty. If a master owns by contract with his servant, or by legal obligation growing out of the relation of parent and child, the service of such servant or child, this right of service is a part of his personal estate. The law affords him damages for an illegal invasion of that right, and the measure of the damage is the value of the service lost. When that right of service is injured, or illegally taken from him, it is a damage to his personal estate, and an action brought to recover damages for the injury to or loss of such personal estate is governed and controlled, so far as the time in which such action must be brought, by the law which limits the time in which actions for damages to personalty or personal estate are to be instituted. The judgment of the court below in sustaining the demurrer to the declaration is reversed.

Fisk, J., disqualified, not sitting.

NOTE. — *Recent Decisions Involving Actions by Parents for Loss of Services of Child.*—Where a minor employed as brakeman by a railroad company is injured without negligence on the company's part, his father, if he has impliedly consented to the employment, cannot recover from the company for loss of his services. Wolf v. East Tennessee, V. & G. Ry. Co. (Ga.), 14 S. E. Rep. 199, 88 Ga. 210. The fact that an action by a minor for personal injuries was brought by his father as his next friend does not constitute a relinquishment by the father of any claim he might assert on account of plaintiff's diminished capacity to earn during his minority. Texas & P. Ry. Co. v. Morin, 18 S. W. Rep. 503, 66 Tex. 225. The fact that a child two and a half years old, in an action brought in its behalf for personal injuries, has recovered damages for its reduced capacity to earn money during its minority, is no reason why the parent should not recover for the same incapacity, since the judgment in the other case was an improper one. Texas & Pac. Ry. Co. v. Morin, 18 S. W. Rep. 345, 66 Tex. 133. A petition in an action by a father to recover for loss of services of his infant son, which alleges the relation of father and son, the infancy of the son, and plaintiff's right to his services, is sufficient, though it fails to allege that the son was plaintiff's

servant. Buck v. People's Street Railway, Electric Light & Power Co., 46 Mo. App. 555. Where a child, injured by the negligence of a third person, is still capable of performing some work, the father, to make out a case in an action for the loss of the services of the child, must prove the probable earning capacity of the child in its injured condition. Schmitz v. St. Louis, I. M. & S. Ry. Co., 46 Mo. App. 380. Where a minor while living with and being supported by its widowed mother is injured by the negligence of defendant, the mother is entitled to recover for the loss of services, and for the labor and expenses reasonably incurred in the care and cure of the minor. Horgan v. Pacific Mills (Mass.), 33 N. E. Rep. 581. Where a minor who is injured through the negligence of defendant is not entitled to its own earnings, but lives with and is supported by a parent, a settlement for such injury with the minor is no defense to an action against defendant by the parent for the loss of services, and the expenses incurred in the care and cure of the minor. Horgan v. Pacific Mills (Mass.), 33 N. E. Rep. 581. The fact that a husband living with and supporting his family, turns over all his earnings to his wife, and allows her to manage, paying family expenses, etc., does not constitute her the head of the family, in such sense that she may maintain an action in her own name for the wages of a minor son. Barrett v. Riley, 42 Ill. App. 258. A mother cannot sue for injuries to her minor child where the father was living at the time of the injury, though he dies before the action was brought. Geraghty v. New (Com. Pl. N. Y.), 27 N. Y. S. 403. Code, sec. 2587, provides that the father, or, in certain contingencies, the mother, may sue for an injury to a minor child. Section 2588 provides that when the death of a child is caused by negligence, the father or the mother may, in certain cases, recover damages, but that a suit by either is a bar to a suit by the personal representative. Held that, where the injury is not fatal, actions may be maintained by both parent and child, said sections not depriving the minor of his own right of compensation for injuries received by him which could not be considered in assessing the damages sustained by the parent. McNamara v. Logan (Ala.), 14 South. Rep. 175. The right of action of a father for an injury to his minor child is based on the parental relation, not that of master and servant, and he is entitled to be indemnified for his expenses in the care and cure of the child, and for loss of services, past and prospective. Netherland-American Steam Nav. Co. v. Hollander (C. C. A.), 59 Fed. Rep. 417, 8 C. C. A. 169. A father who allows his boy to be employed in a coal mine without stipulating for such employment as will not expose him to danger disproportioned to his years and discretion is negligent, and cannot recover for injuries to him. Weaver v. Iselin (Pa. Sup.), 29 Atl. Rep. 49, 161 Pa. St. 386. When a minor has entered the service of a railroad company in a capacity not requiring him to board moving trains, the father is not guilty of contributory negligence in failing to inform himself that the scope of the son's employment has been changed so as to require him to board moving trains, and is not precluded from recovering for the loss of the son's services owing to an accident caused by the more dangerous character of the son's employment. Texas & N. O. Ry. Co. v. Wood (Tex. Civ. App.), 24 S. W. Rep. 569. Where a minor is killed in a dangerous employment, the mere fact that he was employed without his father's consent, does not render the master liable to the father for the loss of the minor's services, but the employment must have been against the will of the father. Toledo, St. L. & K. C. R. Co. v. Trimble (Ind. App.), 35 N. E. Rep. 716. When an adult daughter, who was injured on defendant's railroad, was living with her father, and rendering gratuitous services to him as a member of his family, he is entitled to recover from defendant the cost of medical attendance, and such other necessary expenses as he incurred by reason of the accident. Union Pac. Ry. Co. v. Jones (Colo. Sup.), 40 Pac. Rep. 891. At common law, a father cannot recover, as damages for the negligent killing of his child, the necessary funeral expenses. Jackson v. Pittsburg, C., C. & St. L. Ry. Co. (Ind. Sup.), 39 N. E. Rep. 663. A parent, in an action for damages for an injury to a minor child, is entitled to recover for the loss of the minor's future services to the age of 21 years, and expenses for nursing, surgical and medical attendance, and the increased expense of maintaining the child during minority; and absolute proof of the amount of damages is unnecessary. San Antonio St. Ry. Co. v. Muth, 27 S. W. Rep. 752, 7 Tex. Civ. App. 443. Gen. St. 1894, § 5164, authorizing a father to maintain an action in his own name for an injury to his minor child, applies in all cases where, at common law, such an action might be maintained in behalf of such minor. Buechner v. Shoe Co. (Minn.), 62 N. W. Rep. 817, followed; Lathrop v. Schutte (Minn.), 63 N. W. Rep. 493. A wife whose husband has abandoned her, and failed to provide for her and their minor child, having its entire care and custody, may maintain an action against a railroad company for injuries to the child since the separation took place, causing a loss of his services. Savannah, F. & W. Ry. Co. v. Smith, 21 S. E. Rep. 157, 93 Ga. 742. In an action by a parent for the death of his minor son, caused by the negligence of defendant railroad company while in its employ, the complaint need not allege that the employment of the minor was without plaintiff's consent. Alabama Midland Ry. Co. v. McDonald (Ala.), 20 South. Rep. 472. No right of action by a mother for damages to her minor child exists at common law. Citizens' St. Ry. Co. v. Willoeby (Ind. App.), 43 N. E. Rep. 1058. In an action by a father for injuries to his minor son, not wholly disabling him, an instruction fixing the measure of damages at the value of his services during his minority, instead of the "lessened value," is erroneous. Goodrich v. Burlington, C. R. & N. Ry. Co. (Iowa), 66 N. W. Rep. 770. Recovery for loss of service of a minor child through injury caused by defendant's negligence, cannot be had unless the evidence shows that the injury diminished the capacity of the child to serve its parents. Missouri, K. & T. Ry. Co. of Texas v. Edwards (Tex. Civ. App.), 32 S. W. Rep. 815. Where a party knowingly engages a minor in a dangerous employment, against the known will of the father, and the minor is injured in such employment, such party is responsible to the father for the consequent loss of the services of the minor. Taylor v. Chesapeake & O. Ry. Co. (W. Va.), 24 S. E. Rep. 631. In a very recent case in Texas, the authorities were reversed on the question as to the right of the parent to recover damages for loss of services of a minor child who is instantly killed. The court held that at common law such was the rule, and that it has not been changed by legislation. Gulf, C. & S. F. Ry. Co. v. Beall, 42 S. W. Rep. 1054. The reason of the distinction between the case where the child is instantly killed, and where the services are simply interrupted, is, to use the language of the Texas court, "shadowy," but such was the distinction made by the earlier cases. In the Texas case, the court says: "In Baker v. Boston (decided in 1808), 1 Camp. 493, Lord

Ellenborough said that 'in a civil court the death of a human being could not be complained of as an injury.' In adhering to the broad principle thus announced, Pigott, B., in Osborn v. Gillett (1873), L. R. 8 Exch. 88, which was a suit brought by the father to recover for the loss of services of his daughter, whose death had been occasioned by the negligence of defendant's servant, said: 'By the third plea the defendant says that she was killed on the spot, and the first question is whether this plea affords a good defense in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time, and, if it is to be changed, it rests with the legislature, and not with the courts, to make the change. It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in Baker v. Bolton.' This rule has been generally followed by the American courts, though some vigorous protests have been made against it, and none of the various reasons assigned therefor seem entirely satisfactory. No useful purpose would be subserved by an attempt to add anything to what has been said in the well-considered opinion cited and commented upon by Mr. Tiffany in his work entitled Death by Wrongful Act, sections 1-18, where an interesting and exhaustive discussion of the question will be found. After a careful examination, we are of opinion that, though the reason for the original adoption of the rule announced by Lord Ellenborough is involved in doubt and obscurity, still the rule itself is a well-established principle of the common law of England, adopted in this State by act approved January 20, 1840, and we feel bound thereby."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION AGAINST INSURANCE COMPANY—Agency.—The fact that a bank collects and remits to a domestic insurance company premiums due from its policy holders, but transacts, and is authorized to transact, no other business for the insurance company, is not evidence which will, of itself, sustain a finding that such bank is the agent of such insurance company, within the meaning of section 74 of the Code of Civil Procedure.—BANKERS' LIFE INS. CO. v. ROBBINS, Neb., 73 N. W. Rep. 269.

2. ADJOINING LANDOWNERS—Damages from Excavations.—It was defendant's duty, if necessary to go beneath the foundation of a party wall in making an excavation for a cellar under his building, to notify the adjoining landowner of his intention, and to have the work done promptly and by skillful persons, especially as it was being done in the winter; and for his failure to do so he is liable in damages.—KRISH v. FORD, Ky., 43 S. W. Rep. 237.

3. ADVERSE POSSESSION—Claim of Ownership—Limitations.—If a tax deed to defendants, of land formerly owned by a third person, describes the land by metes and bounds, and in so doing includes a portion of an adjoining larger tract owned by complainant, the occupancy by defendants to the boundaries so defined is sufficient to put the seven-year statute in operation against complainant, where the improvements and boundaries of the original smaller tract have become practically lost, and complainant knows of the extent of defendants' claim, and this though complainant's grant is later than that of the person whose title passed, by the tax deed, to defendants.—SULLIVAN v. DAVIDSON, Tenn., 43 S. W. Rep. 122.

4. ADVERSE POSSESSION—Special Entry.—By seven years' adverse possession, under a special entry of land, a person acquires title to the extent of the calls.—CHILDERS v. RYAN, Tenn., 43 S. W. Rep. 126.

5. ANIMALS—Agistor's Lien.—It was error, as against an attaching creditor, to adjudge the existence of an agistor's lien upon stock which was under full control of the owner.—FELTMAN v. CHINN, Ky., 43 S. W. Rep. 192.

6. APPEAL—Law of the Case.—A ruling on a prior appeal in the same cause must control on a subsequent trial, where the situation is not changed by the issues or evidence.—MCFALL v. IOWA CENT. RY., Iowa, 73 N. W. Rep. 355.

7. APPEAL—Probate Appeals.—Rev. St. 1894, §§ 2609, 2610 (Rev. St. 1881, §§ 2454, 2455), providing that appeals in matters connected with a decedent's estate must be perfected within 40 days, do not apply to proceedings brought to procure a writ of assistance to obtain possession of land purchased at an administrator's sale, as such a remedy is not provided by the probate procedure act.—ROACH v. CLARK, Ind., 48 N. E. Rep. 796.

8. APPEAL—Transcript.—Rev. St. 1889, §§ 2252, 2253, make all appeals taken 30 days before the first day of the next term of the supreme court returnable to such term, and require a transcript of the record or a certified copy of the judgment to be filed 15 days before the first day of the term: Held, that the supreme court, in considering the question of appellant's diligence in perfecting his appeal, will treat the date of filing the bill of exceptions or the expiration of the time allowed therefor as the date of the judgment appealed from.—CUNNINGHAM v. ROUSH, Mo., 43 S. W. Rep. 161.

9. APPLICATION OF PAYMENTS—Interest.—Defendant denying any other indebtedness than the note sued on, and plaintiff's evidence as to an alleged additional indebtedness not being explicit and satisfactory, while defendant's statements are clear, and his recollection good, plaintiff has failed to show any other indebtedness, and an admitted payment should be credited on the note.—ROSS v. REES, Ky., 43 S. W. Rep. 215.

10. ASSAULT AND BATTERY—Abortion.—An action for damages for assault and battery with intent to produce an abortion is an action sounding in tort, wherein the amount of recovery, in the absence of malice, is the actual damages sustained, including physical pain

and suffering and expenses incurred incident to the injury.—COURTNEY v. CLINTON, Ind., 48 N. E. Rep. 799.

11. ATTACHMENT—Fraud.—Creditors may attach goods of their debtor in the hands of those who have conspired with him to conceal the goods.—ADAMS v. PALETZ, Tenn., 43 S. W. Rep. 133.

12. BANKS—Insolvency—Receiving Deposits.—Where a bank remains open, and holds itself out as ready to transact business, this is an implied representation of solvency, and for its officers to then receive a deposit, knowing it to be hopelessly insolvent, is a fraud. The depositor, under such circumstances, may rescind the contract of deposit, and recover back the thing deposited, while it or its proceeds may be distinguished in specie, and before they have become commingled with the general assets of the bank.—HIGGINS v. HAYDEN, Neb., 73 N. W. Rep. 280.

13. BILLS AND NOTES—Consideration.—A note executed by S for the balance of a note upon which he was surety is without consideration if the creditor agreed to accept a composition by the principal with his creditors in discharge of both its secured and unsecured debts against him, and received its *pro rata* under the composition settlement.—SCHUFF v. GERMANIA SAFETY VAULT & TRUST CO., Ky., 43 S. W. Rep. 229.

14. BILLS AND NOTES—Consideration.—After payment of the agreed price by a purchaser of land, the execution by him of a note for an additional sum, in order to get possession of the deed, which was withheld, and because he was afraid, if he did not do so, he would lose the money already paid, is voluntary, and part of the consideration for the land.—DAVIS v. WEATHERED, Tex., 43 S. W. Rep. 21.

15. BILLS AND NOTES—Discharge of Surety—Extension.—After the maturity of a note on which defendant was surety, it was agreed by and between plaintiff, who was the holder thereof, and the principal maker, without the knowledge or consent of defendant, that, on certain monthly payments, such principal should have from one to three years, if necessary, in which to pay such note, and he then and there paid $10 thereon: Held, not binding on the principal, so as to discharge defendant, for want of mutuality, as there was no extension for a definite period.—WEBB v. PAHDE, Tex., 43 S. W. Rep. 19.

16. BILLS AND NOTES—Failure of Consideration.—Where the consideration for a note was a contract by the payee that a third person, then indebted to the payee, would perform a certain contract with the payor, and said third person failed to perform his contract, the consideration of the note failed, and it was a defense.—GALE v. HARP, Ark., 43 S. W. Rep. 144.

17. BOUNDARIES.—Where a survey of land borders on a marsh or lake, a strip of three acres of land extending into the water beyond a straight line called for by the surveyor, and shown on a map of the land, is part of such survey; and this, though the law requires the court to follow the foot-prints of the surveyor in determining the boundary of a given tract.—BLAND v. SMITH, Tex., 43 S. W. Rep. 49.

18. BOUNDARIES—Parol Evidence.—Parol evidence is admissible to show the line actually run and marked by a surveyor, though it deviates from the course called for.—HAGINS v. WHITAKER, Ky., 43 S. W. Rep. 224.

19. CHATTEL MORTGAGES—Book Accounts.—Book accounts, both future and existing, may be mortgaged.—DUNN v. SWAN, Mich., 73 N. W. Rep. 386.

20. CHATTEL MORTGAGES—Fraud.—Where the mortgagors remained in possession of their store after giving a deed of trust of their stock, and transacted business as usual, and the trustee never took possession, and in explanation of the mortgagors' possession there was evidence that the trustee had employed them as clerks, the question of fraud, as against creditors, was for the jury.—BOLTZ v. ENGELKE, Tex., 43 S. W. Rep. 47.

21. CONSTITUTIONAL LAW — Interstate Commerce — Peddler's License.—Pub. Acts 1897, Act No. 248, prohibiting peddling, etc., without license, is repugnant to the constitution of the United States, giving congress the power to regulate commerce, in view of section 8 of said act, permitting manufacturers, farmers and mechanics "residing in this State" to sell without a license.—STATE v. ADSIT, Mich., 73 N. W. Rep. 381.

22. CONTEMPT—Alternative Sentence.—Where a party was found guilty of contempt in disobeying an injunction, and was fined, and it was ordered that if he failed to pay the fine within 15 days he should stand committed to the county jail for the period of 30 days, and the statute (2 How. Ann. St. § 7281) provides that in such cases, if imprisonment be ordered, it shall be for some reasonable time, not exceeding 6 months, and until the expenses of the proceeding and fine be paid, the sentence is void as an alternative one.—SWETT v. THORKILDSEN, Mich., 73 N. W. Rep. 371.

23. CONTEMPT OF COURT—Proceeding to Punish.—Proceedings to punish for contempt of court are not governed by the general provisions of the law which provide for the punishment of crimes, but by special statutes; and therefore the provision of the Code of 1873, authorizing new trials in criminal cases, does not apply in such proceedings.—STATE v. STEVENSON, Iowa, 73 N. W. Rep. 360.

24. CONTRACTS — Abandonment — Evidence.—Where letters between the parties did not show an unqualified offering of employment beyond a certain time, defendants could show an abandonment of the terms, as shown by the letters, by mutual consent, and a new contract of employment subsequently made.—SMITH v. KELLEY, MAUS & CO., Mich., 73 N. W. Rep. 385.

25. CONTRACTS—Consideration—Carriers—Stock Shipments.—A contract for the shipment of cattle and release of injuries, signed some months after the shipment has been completed, and the rights of the parties fixed, and without some new consideration, would be of no effect.—HENDRICK v. BOSTON & A. R. CO., Mass., 48 N. E. Rep. 835.

26. CONTRACT — Parties.—The stockholders of a corporation, the failure of which was imminent, agreed with plaintiff that, if he would let them have the exclusive sale of his goods in their city, they would pay him his claim against the corporation. They organized a new corporation, and plaintiff supplied the new concern with his goods as he agreed: Held, that the question whether the promise to pay the old debt was made on behalf of the old corporation or on behalf of the stockholders individually is a question for the jury.—DURGIN v. SMITH, Mich., 73 N. W. Rep. 361.

27. CONTRACT—Reformation.—A contract will not be reformed for mistake; the contracting parties being experienced business men, the terms of the writing clear and explicit, and the testimony decidedly in support of the contention of plaintiff, that the writing sued on expresses the real contract.—VAUGHN v. DIGMAN, Ky., 43 S. W. Rep. 251.

28. CONTRACT — Reformation — Assignment. — There was a mutual mistake of the parties in reducing to writing an agreement for the sale of real estate, so that the written contract signed by the parties did not express their real intent. The written contract was recorded, and the vendee assigned the same to an innocent assignee for value, without notice of the mistake. In an action brought by the vendor to reform the contract, held, such assignee is not protected, either by the recording act or by the general principles of equity, from the claim of plaintiff to have the contract reformed.—KLATT v. DUMMERT, Minn., 73 N. W. Rep. 404.

29. CONTRACTS—Termination.—One who, after making a contract with two persons, providing for written notice to terminate it, procures the interest of one of such persons by assignment, cannot complain that the other alone gave notice of termination.—HOLT v. SILVER, Mass., 48 N. E. Rep. 887.

30. CORPORATIONS — Fraudulent Assignments for Creditors.—A creditor of an insolvent corporation

may, by attachment, acquire a specific lien upon its property, which will entitle him to a preference over other unsecured creditors, as the mere fact that a corporation is insolvent does not require that there shall be a *pro rata* distribution of its assets among its creditors.—LOUISVILLE BANKING CO. v. ETHERIDGE MANUFG. CO., Ky., 43 S. W. Rep. 169.

31. CORPORATIONS—Names.—A corporation that had used its corporate name in its business transactions in a State for 10 years before plaintiff corporations, with names similar to that of defendant, commenced doing business in that State, cannot be held to have wrongfully used the name of plaintiffs.—HIGH COURT OF WISCONSIN INDEPENDENT ORDER OF FORESTERS v. COMMISSIONER OF INSURANCE OF WISCONSIN, Wis., 73 N. W. Rep. 326.

32. CORPORATIONS — Purchase and Cancellation of Stock.—A solvent corporation has a right by vote of its stockholders to cancel stock subscribed, but not paid for, and a subsequent creditor of the corporation is not prejudiced by such action. — SHOEMAKER v. WASHBURN LUMBER CO., Wis., 73 N. W. Rep. 333.

33. CORPORATIONS—Receiver.—The authority of the receiver of an insolvent corporation to collect assessments made by its board of directors before his appointment as such receiver is sufficiently established by showing that such receiver, under his order of appointment, was required to collect all sums due such insolvent corporation, from whomsoever such indebtedness might be owing.—WYMAN v. WILLIAMS, Neb., 73 N. W. Rep. 285.

34. CRIMINAL EVIDENCE—Larceny.—It was error for the State to introduce, in rebuttal of the testimony of two of defendant's witnesses, the shorthand reports of the evidence of said two witnesses given on their preliminary examinations, since defendant was not permitted to meet those witnesses face to face on the preliminary examination.—POOLER v. STATE, Wis., 73 N. W. Rep. 336.

35. CRIMINAL LAW.—That an indictment charges two distinct and separate offenses in different counts is not ground for a motion in arrest of judgment, where no motion to quash, or to compel the prosecution to elect between the two counts was made.—COLLINS v. STATE, Tex., 43 S. W. Rep. 90.

36. CRIMINAL LAW—Appeal.—The objection that certain witnesses were allowed to remain in the court room, and listen to the testimony of other witnesses, will not be considered on appeal, where it is not shown by the bill of exceptions whether this occurred before or after said witnesses had testified.—MAGEE v. STATE, Tex., 43 S. W. Rep. 98.

37. CRIMINAL LAW—Forgery—Indictment.—Where an indictment charges that the forgery consisted in a false indorsement, purporting to be the act of "Wm. Cook, Jr.," upon the back of a genuine instrument, and the tenor clause sets out the indorsement as by "Wm. Cook, per Wm. Cook, Jr.," the variance is fatal.—THULEMEYER v. STATE, Tex., 43 S. W. Rep. 83.

38. CRIMINAL LAW—Former Jeopardy.—An acquittal of one charged with carrying brass knuckles is a bar to a prosecution for carrying "knuckles made out of metal, same being hard substance." — MORRISON v. STATE, Tex., 43 S. W. Rep. 113.

39. CRIMINAL LAW—Incest.—That an incestuous intercourse was had under such circumstances that the act would amount to rape will not bring it within Code 1873, § 4560, providing that a conviction for rape shall not be had upon the uncorroborated evidence of the prosecutrix.—STATE v. KOUHNS, Iowa, 73 N. W. Rep. 853.

40. CRIMINAL LAW—Insanity—Intent.—One who is so insane from the recent use of cocaine and morphine, that he does not understand the nature and quality of the act he is doing, and is incapable of forming an intent, cannot be guilty of an assault with intent to murder.—EDWARDS v. STATE, Tex., 43 S. W. Rep. 112.

41. CRIMINAL LAW—Instructions — Weight of Testimony.—A charge that the jury might consider, "as evidence against" a defendant, any statement made by him, is erroneous, as a charge on the weight of the testimony, where the only statement shown to have been made was neither a confession of guilt nor an unequivocal admission of any criminative fact, but might but for such charge have been considered by the jury in connection with the other facts and circumstances as favorable to the defendant. — MARTIN v. STATE, Tex., 43 S. W. Rep. 91.

42. CRIMINAL LAW — Manslaughter—Self-defense.—A defendant is guilty of manslaughter, where deceased was making an unlawful and violent assault on him, besides one with intent to murder or inflict serious bodily injury upon him, and he slew deceased before resorting to all other reasonable means within his power, except retreating, or if he used more force than was reasonably necessary.—CHILDRESS v. STATE, Tex., 43 S. W. Rep. 100.

43. CRIMINAL LAW—Prisons—Custody of Prisoner's Money.—A jailer has no authority to take and retain money found upon a prisoner, where it would not constitute evidence against him in his trial for the offense for which he was arrested.—HUBBARD v. GARNER, Mich., 73 N. W. Rep. 390.

44. CRIMINAL LAW—Rape.—An instruction authorizing a conviction if defendant had carnal knowledge of the prosecutrix, "against her will or consent, or by force, or by putting her in fear," is objectionable, as authorizing a conviction though no force, actual or constructive, was used.—BROWN v. COMMONWEALTH, Ky., 43 S. W. Rep. 214.

45. CRIMINAL LAW—Rape.—It is no defense to a prosecution for rape of a child under the age of consent that accused was told by his victim that she was above such age.—EDENS v. STATE, Tex., 43 S. W. Rep. 89.

46. CRIMINAL LAW—Rape—Age of Consent.—In a prosecution for rape upon a female child under the age of 15 years, under Code 1873, § 3861, as amended by Laws 26th Gen. Assem. ch. 70, fixing the age of consent at 15 years, it is immaterial that the prosecutrix was large of her age, physically strong, and of a romping disposition, as the defendant was guilty of rape whether the sexual intercourse was against her will or not.—STATE v. BAILOR, Iowa, 73 N. W. Rep. 844.

47. CRIMINAL LAW — Rape — Continuance. — Where both defendant and prosecutrix swear that no previous act of sexual intercourse had occurred between them, an application for continuance for the absence of a witness who is expected to testify to such previous intercourse should be overruled.—MCINTYRE v. STATE, Tex., 43 S. W. Rep. 104.

48. CRIMINAL LAW—Recognizances—Release of Sureties.—Code Cr. Proc. 1895, art. 498, providing that "when a defendant who has been arrested for a felony under a *capias* has previously given bail to answer said charge, his sureties shall be released by such arrest, and he shall be required to give new bail," does not apply where the second arrest is under a second indictment, though such indictment be based on the same transaction as the first.—FOSTER v. STATE, Tex., 43 S. W. Rep. 80.

49. CRIMINAL LAW — Sale of Obscene Photographs.—He who took a photograph of a nude woman, and delivered it to her, on receipt of the price, violated Acts 21st Gen. Assem. ch. 177, § 1, prohibiting the sale of obscene photographs. — STATE v. DOTY, Iowa, 73 N. W. Rep. 352.

50. CRIMINAL LAW—Theft.—Where, on trial for cattle theft, defendant claimed to have bought the animal from another, an instruction that, if defendant purchased the animal from such other person, or if the jury had reasonable doubt as to whether he did so purchase it, the defendant must be acquitted, though such other person may have stolen the animal, was a sufficient presentation of the defense. — RUSSELL v. STATE, Tex., 43 S. W. Rep. 81.

51. CRIMINAL LAW — Theft.—A request to charge that if defendant "took" the horse alleged to be stolen, and, when his right to it was questioned, he gave the reasonable explanation that he bought it, the State must prove that his explanation was false, should be refused; for, if he took the horse, an explanation that he bought it would not be reasonable.—RAY v. STATE, Tex., 43 S. W. Rep. 77.

52. CRIMINAL PRACTICE—Disturbing Public Worship.—An indictment charging a defendant with disturbing a congregation "assembled for religious worship in a lawful manner" is insufficient to charge the offense defined by Rev. Pen. Code, art. 193, of disturbing a congregation "assembled for religious worship and conducting themselves in a lawful manner." — KIZZIA v. STATE, Tex., 43 S. W. Rep. 86.

53. CRIMINAL TRIAL — Jurors — Competency.—Under Code 1873, §§ 4405, 4407, 4408, providing, among other things, that a want of any of the qualifications prescribed by statute to render a person a competent juror shall be ground for a challenge for cause, and that a juror challenged, and other witnesses, may be examined, to prove or disprove the challenge, the right to challenge for cause is discretionary, and may be waived; and, where a juror in a criminal case could not read or write the English language, defendant, by failing to examine said juror, will be taken to have waived objection, notwithstanding Laws 26th Gen. Assem. ch. 61, § 1, provides, as a qualification for a competent juror, that he must be able to read and write the English language.—STATE v. PICKETT, Iowa, 73 N. W. Rep. 346.

54. DAMAGES—Interest.—In an action for injuries, interest for the period intervening between the dates of injury and judgment cannot be allowed.—TEXAS & N. O. R. CO. v. CARR, Tex., 43 S. W. Rep. 18.

55. DEATH BY WRONGFUL ACT — Damages. — Under Gen. St. 1894, § 5913, damages recovered by reason of the wrongful act of a party causing death are for the exclusive benefit of the widow and next of kin: Held, that under this section of the statute the husband is not the next of kin of the deceased wife. — WATSON v. ST. PAUL CITY RY. CO., Minn., 73 N. W. Rep. 400.

56. DEATH BY WRONGFUL ACT—Negligence—Presumption.—In an action for death by wrongful act, it is presumed, until the contrary appears, that deceased, prompted by the instinct of self-preservation, exercised ordinary care. — DALTON v. CHICAGO, R. I. & P. RY. CO., Iowa, 73 N. W. Rep. 349.

57. DEED—Equitable Title.—An instrument, while not a deed so as to pass the legal title, because not purporting to presently convey the title, but binding the obligor to make a deed on demand of the obligee, passes the equitable title; it being shown on its face that the obligor had already sold the land to the obligee, and that the consideration for it had been paid.—TOMPKINS v. BROOCKS, Tex., 43 S. W. Rep. 70.

58. DEEDS — Estates Created. — A deed to a certain person, and to her bodily heirs after her decease, conveys to her an estate in fee.—BROWN v. BROWN, Tenn., 43 S. W. Rep. 126.

59. DIVORCE—Imprisonment for Life.—Where a husband is serving a life sentence in the State penitentiary, the wife should not be denied a divorce for abandonment upon the ground that the living apart "is not voluntary," as the separation is not without fault on his part. — DAVIS v. DAVIS, Ky., 43 S. W. Rep. 168.

60. DIVORCE—Permanent Alimony.—The right to permanent alimony is not established by the fact that a divorce has been granted, where, at a subsequent hearing on the alimony question, on additional testimony, the judge is convinced that the divorce was obtained by a suppression or perversion of facts by complainant herself.—ADAMS v. SEIBLEY, Mich., 73 N. W. Rep. 877.

61. ELECTIONS—Intimidation. — Where, by reason of disturbance and intimidation, so large a number of voters are prevented from voting that what would have been the result of the election if they had been allowed to vote cannot be ascertained, the election will be set aside.—HODGE v. JONES, Tex., 43 S. W. Rep. 41.

62. EQUITY — Injunction.—Defendant was appointed deputy state veterinarian, and as such attempted, under Sess. Laws 1893, ch. 172, as amended by Sess. Laws 1895, ch. 183, to collect inspection fees from plaintiffs, who were shippers of live stock to points outside the State. Plaintiffs, upon a complaint setting forth these facts, and alleging the act to be unconstitutional, prayed an injunction restraining the deputy from interfering with plaintiffs' shipments: Held that, if the act is unconstitutional, the defendant is a mere trespasser, and the plaintiffs have a plain remedy at law, and the equitable remedy of injunction should not be granted. — FRANKLIN v. APPEL, S. Dak., 73 N. W. Rep. 259.

63. ESTOPPEL—Partition.—Where a mother consented that her own land, as well as land descended to her children from their father, should be divided among the children, to take effect at her death, two of the children at whose instance such division was made, and one of whom is in possession, under that division, of the whole of the land descended from the father, are estopped, after the mother's death, to claim the whole of her land under a subsequent deed from her conveying to them the fee.—FLOYD v. SHARP, Ky., 43 S. W. Rep. 253.

64. ESTOPPEL TO PLEAD USURY. — The maker of a note is estopped to plead usury against one whom he has induced to purchase it by his representation that he had no defense against the note. — BLADES v. NEWMAN, Ky., 43 S. W. Rep. 176.

65. EVIDENCE — Declarations of Vendor.—Where the vendor, with the consent of the vendee, remains in possession after sale, his declarations while thus in possession, tending to characterize the possession, are admissible in evidence as part of the *res gestæ* against the vendee, and in favor of the creditors of the vendor, who are attacking the sale as fraudulent. The same rule applies where the vendee has ostensibly acquired title from a third party, and the debtor has, with his consent, taken and continued in possession, and creditors are assailing the title of the vendee as merely colorable, and held in secret trust for the debtor. — LEHMANN v. CHAPEL, Minn., 73 N. W. Rep. 402.

66. EXECUTION. — Where a constable's deed to lands sold under execution is apparently valid, and the execution defendant seeks to avoid it as against a subsequent purchaser for value, he must show affirmatively that the purchaser had notice of extrinsic defenses.—LEBRETON v. LEMAIRE, Tex., 43 S. W. Rep. 31.

67. GAMBLING CONTRACTS — Dealing in Futures. — Plaintiff paid money to cotton brokers, who agreed to place for him contracts with defendants for the purchase and sale of cotton for future delivery. Actual delivery was not contemplated, and the sums to be received or paid by plaintiff depended on the fluctuation of the cotton market. Plaintiff was not known in the transactions between the bankers and defendants, and the money paid by him was deposited without condition by the bankers to the credit of defendants, who had contracted to pay the brokers one-half of the commissions received by them: Held to be a gambling transaction, precluding a recovery of money so deposited, whether the brokers and defendants were partners or not; since, if they were, the illegality of the transaction and the fact that the money had been paid would prevent recovery; and, if they were not, such illegality, and the fact that there was no privity between plaintiff and defendants, would prevent it. — CUNNINGHAM v. FAIRCHILD, Tex., 43 S. W. Rep. 32.

68. GIFT—Surrender to Donor.—A father gave his son some notes and a mortgage, but with the understanding that he was to have the interest on the notes until his death. The father afterwards was given possession of the notes, that he might collect the interest,

and they were found among his papers after his death: Held, that these facts do not establish a surrender of the gift.—MCNALLY V. MCANDREW, Wis., 73 N. W. Rep. 815.

69. GUARANTY—Acceptance—Notice to Guarantors.—Under a guaranty of the payment of any bill that O may purchase, "within ninety days from date of purchase, to the extent of two hundred dollars," stating that "this guaranty is intended to cover a running account, and is to be binding upon us until we notify you to the contrary, in writing," notice of the acceptance of the guaranty, or that goods have been sold on the faith of it, is necessary to charge the guarantors; but formal notice in writing is not necessary. It being sufficient that the guarantors have knowledge within a reasonable time that goods have been sold on the faith of the guaranty.—EATON V. HARRIS, Ky., 43 S. W. Rep. 199.

70. GUARANTY—Release of Guarantor. — The payee of a bond secured by mortgage, who, on assigning it, guarantied "the collection of the principal sum within six months after maturity," etc., was released from liability as guarantor, where the assignee did not bring any action to enforce the claim until two years after maturity, and gave no reason for such delay.—STACKPOLE V. DAKOTA LOAN & TRUST CO., S. Dak., 73 N. W. Rep. 258.

71. HOMESTEAD — Alienation.—Const. art. 16, § 2, providing that the alienation of a homestead by the owner, if a married man, shall not be valid without the wife's signature, does not permit of a conveyance, without the wife's signature, though a life estate in the homestead is reserved to her.—GAD BY V. MONROE, Mich., 73 N. W. Rep. 367.

72. HOMESTEAD — Joint Conveyance. — Under the constitution, a homestead can be alienated only by the joint deed of husband and wife, and therefore neither a void deed of trust, including land occupied as a homestead, made by the husband for the benefit of certain creditors, nor a void assignment, specially reserving the homestead, made by the husband and wife, will operate to devest either the husband or wife, of their homestead rights.—BANK OF COOKVILLE V. BRIER, Tenn., 43 S. W. Rep. 140.

73. HOMESTEAD — Mistake in Allotment.—A creditor who has stood by at the allotment of a homestead to his debtor, under a deed of assignment for the benefit of creditors reserving the homestead, and has received his *pro rata* upon his debt in the settlement made by the assignees, without any objection to the allotment, for about three years, cannot complain of a mere mistake of judgment as to value on the part of the commissioners in making the allotment.—WOOD V. CORLEY, Ky., 43 S. W. Rep. 235.

74. HUSBAND AND WIFE—Fraudulent Conveyances.—When a wife allows her husband to use her money in his business, there is an implied promise that the husband will repay in the absence of circumstances tending to show the contrary.—SYKES V. CITY SAV. BANK, Mich., 73 N. W. Rep. 369.

75. INSURANCE — Defense of Willful Burning—Estoppel.—That the complaint in a criminal proceeding against one for burning his barn was made by an officer of an insurance company does not estop the company to make the defense, in an action by such owner for the insurance, that he willfully burned the building, though he was discharged on the examination in the criminal proceedings.—BARNETT V. FARMERS' MUT. FIRE INS. CO. OF ALLEGAN & OTTAWA COUNTIES, Mich., 73 N. W. Rep. 372.

76. INSURANCE—Fall of Building—Policy.—A policy of fire insurance in the statutory form provided that if the insured building should fall, except as the result of fire, such insurance on the building and its contents should immediately cease. Such provision was preceded by a specific clause defining the insurer's liability in case of an explosion. A boiler exploded in the basement of an adjoining building, and both buildings fell in, a fire ensuing: Held, that such a fall of the insured building did not invalidate the policy.—JOHN DAVIS & CO. V. INSURANCE CO. OF NORTH AMERICA, Mich., 73 N. W. Rep. 393.

77. INSURANCE — Fireproof Safe Clause.—Failure of insured to comply with a provision of the policy, requiring him, on pain of forfeiture, to keep books of account of the amount of sales and purchases of stock made by him, and to keep them in a fireproof safe, is a defense to an action on the policy.—NIAGARA FIRE INS. CO. V. FOREHAND, Ill., 43 N. E. Rep. 880.

78. INSURANCE—Misrepresentation of Title—Notice to Agent.—When the insured told the agent of the insurer on several different occasions while the agent was soliciting the insurance the true condition of her title, the insured will be deemed to have had notice thereof, notwithstanding the written application, made afterwards and upon the issuance of the policy, but not referred to therein, makes a different statement.—QUEEN INS. CO. OF AMERICA V. MAY, Tex., 43 S. W. Rep. 73.

79. JUDGMENT — Res Judicata.—A judgment dismissing an action to recover the value of timber taken from land of which plaintiff was not in possession, in which defendants denied plaintiff's title, and asserted title in themselves under a sheriff's deed, is a bar to a subsequent action by plaintiff to set aside the sheriff's deed, and recover the land, though plaintiff has perfected his title since the former judgment; it being necessary for plaintiff to show title in order to recover in the former action.—CARLISLE V. HOWES, Ky., 43 S. W. Rep. 191.

80. JUDGMENT — Res Judicata.—Where an assignee of defendant in an attachment suit is not a party, a holding therein that the evidence does not show that the assignment was fraudulent in fact does not prevent plaintiff from putting in the same evidence on the subsequent trial of the same issue, raised by an interplea filed by the assignee.—TREADWELL V. PITTS, Ark., 43 S. W. Rep. 142.

81. JUDGMENT—Right to Vacate.—A default judgment upon a forged note will not be set aside upon the ground that defendant was dissuaded by her attorney from making defense upon the representation that she would be defeated, and, moreover, that the judgment could be satisfied out of a judgment in her favor against plaintiff, the collection of which has since been enjoined by plaintiff.—COX V. ARMSTRONG, Ky., 43 S. W. Rep. 189.

82. LANDLORD AND TENANT—Illegal Dispossession.—Where one is in possession of land without right, and has been turned out by the owner, his only remedy is as for forcibly entry and detainer.—VINSON V. FLYNN, Ark., 43 S. W. Rep. 146.

83. LIBEL—Manager of Paper.—In a criminal prosecution for libel, it was immaterial whether defendant was responsible for the publication of the article in question, on account of the fact that he was the financial manager of the paper in which it was published, where it appeared that he had admitted the writing of such article.—NOBLE V. STATE, Tex., 43 S. W. Rep. 80.

84. LIBEL AND SLANDER — Special Damages.—Words charging that plaintiff "is a drummer for a whore house" are not actionable *per se*, as it cannot be said that by general acceptation among the public among whom they were used they were understood as charging the indictable offense of inducing virtuous women to enter upon a life of shame, or of inducing persons to attend whore houses, and then commit fornication or adultery.—MUDD V. ROGERS, Ky., 43 S. W. Rep. 255.

85. LIBEL AND SLANDER—Survival of Action.—An action for libel is an action for slander, within the meaning of Ky. St. § 10, and does not, therefore, survive the death of the plaintiff.—JOHNSON'S ADMX. V. HALDEMAN, Ky., 43 S. W. Rep. 226.

86. LIMITATIONS — Computing Time.—An action is brought within a year after the accident, as limited by statute, if brought in the year following, on the day of

the month of the accident.—TEXAS & P. RY. CO. v. MOORE, Tex., 43 S. W. Rep. 67.

87. LIMITATIONS—Pleading.—In an action for injuries caused by the falling of a scaffold, the original declaration averred that the scaffold fell owing to its faulty construction. An amended declaration, filed after the statute of limitations had run, charged negligence in overloading the scaffold: Held that, as this stated a new cause of action, the statute was a bar.—CHICAGO & A. R. CO. v. SCANLAN, Ill., 48 N. E. Rep. 826.

88. LIMITATIONS—Trusts.—Where money was sent to decedent in trust for children, and decedent acknowledged the trust, and declared his intention to perform it, the trust was a continuing one, and limitations never began to run, the trustee having never disavowed.—COWAN v. HENIKA, Ind., 48 N. E. Rep. 809.

89. MARSHALING ASSETS.—A first mortgagee waived his lien in favor of the second mortgagee with the understanding that the second mortgagee would see that the money advanced was applied to the improvement of the mortgaged premises. The money was given to the mortgagor, who abandoned the property when the buildings were partly completed. The second mortgagee sued to foreclose, and laborers, material-men, and judgment creditors secured liens on the property: Held, that the liens should be marshaled as follows: (1) Costs; (2) expense of protecting abandoned buildings from weather; (3) taxes; (4) mechanics' liens; (5) to the second mortgagee, an amount equal to the first mortgagee's lien, less the mechanics' liens; (6) judgments taken before the second mortgage was executed, (7) · · · ; (8) to the first mortgagee, the amount of his lien; (9) to the second mortgagee, the amount of his lien not heretofore provided for; (10) the residue to be paid into court, to abide orders.—WAYNE INTERNATIONAL BUILDING & LOAN ASSN. v. MOATS, Ind., 48 N. E. Rep. 793.

90. MASTER AND SERVANT — Assumption of Risk.—Where an employee had worked for six weeks on a machine on which he was injured, and for two years on a similar machine, and was of full age and average understanding, and there was no evidence of defects in the machine, he assumed an obvious risk by which he was injured.—DONAHOE v. WASHBURN & MOEN MANUFG. CO., Mass., 48 N. E. Rep. 842.

91. MASTER AND SERVANT—Contributory Negligence.—Ky. St. § 2732, which provides that "any person employed in any mine governed by this statute, who intentionally or willfully neglects or refuses to securely prop the roof of any working place under his control, or neglects or refuses to obey any order given by any superintendent of the mine in relation to the security of that part of the bank where he is at work," shall be liable to a fine, was specially intended to apply to miners actually engaged in taking out coal, and thereby removing the natural props of the roof, and has no application to one specially employed as tracklayer in the entry of a mine.—ASHLAND COAL, IRON & RAILWAY CO. v. WALLACE'S ADMR., Ky., 43 S. W. Rep. 207.

92. MASTER AND SERVANT — Defective Machinery.—Where plaintiff alleges that the defect in machinery by reason of which he was injured was unknown to "defendant," and could not have been discovered by him, but could have been discovered by defendant's agents, it is manifest that the pleader's meaning was that the defect was unknown to "plaintiff," and the petition is good.—KENTUCKY CENT. RY. CO. v. CARR, Ky., 43 S. W. Rep. 193.

93. MASTER AND SERVANT — Injury to Employee.—Where a boy 17 years old was shown how to operate a roller in a mill, the master was not liable where the boy allowed his fingers to be caught in the teeth of the roller, the danger being obvious.—O'CONNOR v. WHITTALL, Mass., 48 N. E. Rep. 844.

94. MASTER AND SERVANT—Negligence—Inspection.—Where a servant, discovering the apparently dangerous condition of a covering under which his duties compelled him to stand, called the attention thereto of the workmen whose duty it was to inspect and repair such defects, he had a right to rely on the inspection by such workmen, when the danger could have been discovered by proper inspection; and after such notice the master was responsible for the maintenance of the dangerous condition of such covering.—INDIANA IRON CO. v. CRAY, Ind., 48 N. E. Rep. 603.

95. MECHANIC'S LIEN — Acceptance of Notes.—Where a building contract provides for the owner giving time notes for part of the contract price, which, by their terms, will not mature within the time allowed by statute for commencing an action to enforce a mechanic's lien, but the contract expressly provides that the taking of such notes shall not be construed as a waiver of the right of the contractor to impose or enforce a statutory lien on the property, held, that the taking of the notes in accordance with the contract does not waive or suspend the right to enforce the lien against the property. The note will, under the circumstances, be deemed as merely collateral to the right of lien.—BUTLER-RYAN CO. v. WILLIAM B. SILVEY REALTY CO., Minn., 73 N. W. Rep. 406.

96. MECHANIC'S LIEN—Claim—Items.—All the materials for which there are charges in a claim for a mechanic's lien must have been furnished as parts of one transaction or under one contract for a building or job of work.—NYE & SCHNEIDER CO. v. BERGER, Neb., 73 N. W. Rep. 274.

97. MORTGAGE—Constructive Notice of Unrecorded Deed.—A purchaser of real property from one who appears of record to have the title is not required to examine for mortgages made to the latter after he became the owner, nor is the record of such a mortgage constructive notice to the purchaser of a prior unrecorded deed made by his grantor to the mortgagor.—STERNBERGER v. RAGLAND, Ohio, 48 N. E. Rep. 811.

98. MORTGAGES—Mental Capacity of Mortgagor.—The mere fact that the mortgagor has not a high order of intellect, or that he has entered into imprudent and disastrous ventures, is not sufficient to establish his incapacity to contract; the burden being on his representatives, resisting the enforcement of the mortgage, to show his incapacity.—HALL'S ADMR. v. MUTUAL LIFE INS. CO., Ky., 43 S. W. Rep. 194.

99. MORTGAGES—Priority of Attachment.—The lien acquired by the levy of an attachment has priority over an unrecorded mortgage which was in existence, but of which the attaching creditor had no notice, at the time his debt was created.—WICKS v. MCCONNELL, Ky., 43 S. W. Rep. 205.

100. MORTGAGES—Priority of Claim for Funeral Expenses.—A claim for the funeral expenses of a dead mortgagor is not entitled to priority over the mortgage lien, either at common law or under Ky. St. § 3868, which provides that: "If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of, a decedent, shall be paid in full before any *pro rata* distribution shall be made."—MILWARD v. SHIELDS, Ky., 43 S. W. Rep. 184.

101. MORTGAGES — Unrecorded Contract of Sale—Priority.—The vendor, under an unrecorded land contract, secretly assigned the contract and notes therewith, and then gave a mortgage to another party. The assignee of the contract brought suit to foreclose the contract, and impleaded the subsequent mortgagee: Held, that though the vendee, under the contract, was in possession of the land, the rights of the vendor's secret assignee of the contract were subordinated to those of the mortgagee.—FIRST NAT. BANK OF STEVENS POINT v. CHAFEE, Wis., 73 N. W. Rep. 318.

102. MUNICIPAL CORPORATIONS—Dedication of Streets—Liability.—A municipal corporation which has never

accepted, either expressly or by implication, the dedication of a street, is not liable for injuries to animals from the maintenance of a barbed-wire fence on the ground thus dedicated.—COCHRAN v. TOWN OF SHEPHERDSVILLE, Ky., 43 S. W. Rep. 250.

103. MUNICIPAL CORPORATIONS—Defective Sidewalks—Negligence.—In an action against a city for personal injuries caused by defective sidewalk, where it appeared that the defect complained of was a plainly visible hole in the walk, large enough to admit a man's foot, and that the sidewalk was very generally traveled, and that the hole had existed for about a year, it was sufficient to show the city guilty of negligence.—CRITES v. CITY OF NEW RICHMOND, Wis., 73 N. W. Rep. 322.

104. MUNICIPAL CORPORATIONS—Defective Sidewalks—Negligence.—Where plaintiff showed that he was walking in a snowstorm that might conceal a hummock of ice formed around a pump in the sidewalk, upon which he slipped and fell, his attention being at the time momentarily directed by being accosted by a friend, it cannot be said that he was guilty of negligence, as a matter of law, in not seeing and avoiding the ice.—KENYON v. CITY OF MONDOVI, Wis., 73 N. W. Rep. 314.

105. MUNICIPAL CORPORATIONS—Mayor—Absence from City.—Under Laws 1887, ch. 162, § 3, and ch. 2, § 4, providing that, in the absence of a mayor from a city, the duties of his office shall be performed by the president of the common council, the mayor can perform no official duty while absent from the city, and the appointment of a board of commissioners made by him while so absent is a nullity.—STATE v. BYRNE, Wis., 73 N. W. Rep. 320.

106. MUNICIPAL CORPORATIONS—Tax Deed from City.—A deed of city real estate, issued by a municipal corporation in pursuance of a sale of the property by the city tax collector for taxes due the city, is not *prima facie* evidence that the tax had been levied according to law. Such levy must be proved by proof of the ordinance passed by the city council, making the levy.—EARLE v. CITY OF HENRIETTA, Tex., 43 S. W. Rep. 15.

107. NEGLIGENCE—Instructions.—Where plaintiff, in an action based on negligence, has alleged several independent acts of negligence, it is error to charge that "the burden is upon the plaintiff to prove each of the material allegations in his petition," since proof of any one of the acts alleged would be sufficient.—DAVIS v. MISSOURI, K. & T. RY. CO. OF TEXAS, Tex., 43 S. W. Rep. 44.

108. NEGOTIABLE INSTRUMENT—Certificate of Deposit.—The question whether title passes, to a negotiable instrument delivered to a bank under a restrictive, but ambiguous, indorsement, without an express contract, but in pursuance of an established usage, is one of fact, rather than law, and depends on the intent of the parties.—UNITED STATES NAT. BANK OF OMAHA v. GEER, Neb., 73 N. W. Rep. 266.

109. NUISANCES—Sewerage—Damages.—Where a nuisance created and maintained by defendant was of a permanent character, plaintiff was entitled to recover, in a single action, all the damages that have accrued or may accrue in consequence of such injury, the measure thereof being the depreciation in the value of his lands by reason of such nuisance.—CITY OF PARIS v. ALLRED, Tex., 43 S. W. Rep. 62.

110. OFFICERS—Subjection of Fees to Claims of Creditors.—Although deputy assessors, by contract with their principal, are to have a lien on, and to be paid out of, the salary and fees allowed to the principal by the State for services rendered by him and his deputies, they are not entitled to judgment requiring the auditor and treasurer of the State to pay to them the amount of their salaries, instead of to the principal, though their claims may otherwise be lost, as the fees and compensation due to officers cannot be subjected to claims of creditors.—TILLER v. BURKE, Ky., 43 S. W. Rep. 182.

111. PARTNERSHIP.—In an action seeking to hold decedent's estate for goods sold his successor in business by plaintiff's agent, it was proper to refuse an instruction that, if decedent permitted his name and sign to remain on the store, he would be responsible to all persons giving credit on that account, in the absence of any evidence that plaintiff's agent so gave credit.—MARSCHALL v. AIKEN, Mass., 48 N. E. Rep. 845.

112. PLEADING AND PROOF—Variance—Landlord and Tenant.—In an action for trespass on the person and property while plaintiff was rightfully in possession of certain real property, she was not prevented from recovering because the declaration alleged she was in possession as vendee, and the proof was that she was in possession as tenant.—SMITH v. DETROIT LOAN & BUILDING ASSN., Mich., 73 N. W. Rep. 395.

113. RAILROAD COMPANY — Condemnation Proceedings.—Owners of land formally appropriated by a railroad company have a lien for the value of the same, as found in the award, which is superior to that of any previous or subsequent mortgage by the company upon the same property.—COBURN v. SANDS, Ind., 48 N. E. Rep. 786.

114. RAILROAD COMPANY—Contributory Negligence.—There was no error in charging that defendant was not liable for injuries received by plaintiff by being struck by a moving car while walking through defendant's yards, where it appeared that plaintiff was guilty of contributory negligence, and that defendant's servants operating the train failed to discover his danger in time to prevent such injury, though they could have done so by the exercise of diligence.—SMITH v. HOUSTON & T. C. R. CO., Tex., 43 S. W. Rep. 34.

115. RAILROAD COMPANY—Dangerous Premises—Negligence.—Where a defendant railroad company allowed ice to form several days on its platform from the drippings from the roof of its depot, which by the exercise of ordinary care could have been known of and either removed or rendered harmless, it is negligent, and responsible to one who, without negligence, is injured thereby.—WATERBURY v. CHICAGO, M. & St. P. R. CO., Iowa, 73 N. W. Rep. 341.

116. RAILROAD COMPANY—Negligence.—Where a railroad voluntarily constructs a bridge over ditches along its right of way, as a private way for the use and convenience of occupants of abutting land, it is liable to a party, for whose use it was built, for injuries caused by its failure to keep the bridge in proper repair.—TEXAS & P. RY. CO. v. HALL, Tex., 43 S. W. Rep. 25.

117. RECEIVER—Action by Foreign Receiver.—A foreign receiver may sue in Kentucky, if resident creditors are not adversely affected thereby.—JOHNSTON v. ROGERS, Ky., 43 S. W. Rep. 284.

118. REPLEVIN—Exemptions — Attorney's Library.—The library of an attorney at law, a resident of the State, is exempt, under section 530 of the Code of Civil Procedure; but, by virtue of section 531 of the Code, such exemption cannot be claimed against an execution upon a judgment recovered against him for moneys received professionally for the judgment creditor.—SHRECK v. GILBERT, Neb., 73 N. W. Rep. 276.

119. SALE—Conditional Sales.—A contract for the sale of machinery consisting of an engine, boiler, and shingle-mill equipment was in form a lease for a certain term, and provided that the title should not pass until certain sums mentioned were paid, that the machinery should not become a fixture by virtue of being annexed to the realty, and that upon payment of the sums therein specified the vendors would execute a bill of sale for the same: Held, that this contract was not a lease, but a conditional sale.—WICKES BROS. v. HILL, Mich., 73 N. W. Rep. 375.

120. SALES—Exclusive Selling Rights—Set-Off.—One who purchases typewriter machines of a firm, under contract to sell them in assigned territory, and, in order to make them salable, perfects each machine sent him by aligning it, and makes no complaint of

the defect other than to call the firm's attention to it while at their main office, and makes no charge for such work in responding to monthly statements of account sent to him, cannot claim a charge for services in aligning said machines as a set-off in an action on a bond given on appeal from a judgment in favor of the firm for the price of the machines.—WYCKOFF, SEAMANS & BENEDICT v. BISHOP, Mich., 73 N. W. Rep. 392.

121. SALE OF LAND—Rescission—False Representations.—The owner and operator of an hotel represented to complainants, to induce them to buy it for $6,000, that it was worth from $6,000 to $8,000; that it would earn $100 per month, and had earned that, aside from the bar, for the five months prior, during which time he had operated it. He knew that complainants relied on his statements: Held, that his representations were not mere expressions of opinion, but statements of facts, on which complainants had the right to rely; and, on such representations proving false, complainants had a right to rescind the sale.—MILLER v. VOORHEIS, Mich., 73 N. W. Rep. 383.

122. SLANDER—Pleading.—A complaint for slander, which alleges that the defendant said of the plaintiff, "I know he took wheat that did not belong to him," thereby meaning and charging, and understood by persons then present to mean and charge that the plaintiff had feloniously stolen, taken, and hauled away, of the personal goods and chattels, etc., is good, as, while the words are not actionable *per se*, the colloquium and innuendo show that the words were slanderous.—HINESLEY v. SHEETS, Ind., 48 N. E. Rep. 802.

123. SPECIFIC PERFORMANCE—Title.—Complaint to enforce contract of vendor, made as part of his contract of sale, that he would repurchase at the end of two years, should the purchaser then desire to sell, sufficiently alleges title, as against demurrer, by stating that plaintiff performed every condition of the contract on his part, and prior to commencement of action, on a certain day, duly tendered to defendant a warranty deed, in fee-simple, duly executed; Comp. Laws, § 4927, providing that, in pleading performance of conditions precedent in a contract, it is enough to state generally that the party duly performed all the conditions on his part.—DE FORD v. HYDE, S. Dak., 73 N. W. Rep. 265.

124. STATUTES—Conclusiveness of Enrolled Bill.—The legislative journals are not admissible to show that a statute was not passed in conformity to the constitutional requirements, the enrolled bill, when properly attested by the presiding officers of the two houses, being conclusive.—OWENSBORO & N. RY. CO. v. BARCLAY'S ADMR., Ky., 43 S. W. Rep. 177.

125. TAXATION—Privilege Tax—Exemption.—Provision of a charter of railroad company that the stock in the company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation of the company, shall be forever exempt from taxation, provided the stock or dividends, when the dividends exceed legal interest, may be subject to taxation in common with money at interest, but no tax shall be imposed so as to reduce dividends below legal interest, does not exempt the company from privilege taxation.—KNOXVILLE & O. R. CO. v. HARRIS, Tenn., 43 S. W. Rep. 115.

126. TOWN SUPERVISOR—Eligibility.—Under section 50 of the town law, a trustee of a school district is not only incapable of holding the office of supervisor, but also of being elected to that office.—PEOPLE v. PURDY, N. Y., 48 N. E. Rep. 821.

127. TRADE-MARKS AND TRADE-NAMES—Labels.—The members of a voluntary union of cigar makers are entitled to the protection of the courts in the exclusive use of a label to designate the exclusive product of their labor, though they are not engaged in business, in the ordinary sense, but are employed for wages, and do not own the property to which the label is attached; and the label is not objectionable, as denouncing other cigars than union-made ones, because it states that the cigars to which it is attached were made by "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship."—HETTERMAN v. POWERS, Ky., 43 S. W. Rep. 180.

128. TRESPASS TO TRY TITLE—Title to Maintain.—Under Rev. St. 1895, art. 5259, declaring that "all certificates for headright, land script, bounty warrant or other evidence of right to land recognized by the laws of this State which have been located and surveyed, shall be deemed and held as sufficient title to authorize the maintenance of the action of trespass to try title," the action cannot be maintained on a right lower than that acquired by survey of, as well as location on, the land.—FALL v. NATION, Tex., 43 S. W. Rep. 46.

129. TRIAL—Jury.—A litigant, for the purpose of exercising his right of peremptory challenge, should be permitted to ask a juror whether he occupies the relation of client to the opposing attorneys, but the refusal to permit the juror to answer the question is not reversible error, in the absence of anything tending to show that appellant was prejudiced thereby.—LOWE v. WEBSTER, Ky., 43 S. W. Rep. 217.

130. TRUSTS—Rights of Creditors.—A secret trust will not be enforced, as against creditors of the person sought to be charged with the trust, where the debts were created while the title was in the debtor, and without notice of the equity, and no claim was asserted until after the creditors had acquired liens, and obtained judgment for a sale of the land to satisfy the liens.—WILLIAMS v. WILLIAMS, Ky., 43 S. W. Rep. 198.

131. VENDOR'S LIEN — Foreclosure — Parties. — As a wife has no homestead rights to land, as against a vendor's lien on said land, she is not a necessary party to a suit to foreclose such a lien.—BRIGHTMAN v. FRY, Tex., 43 S. W. Rep. 60.

132. WILL—Construction.—Where a will recites that the testator is largely indebted to his executor for "means, advice, and other aid," and that there has never been any settlement between them, and provides that the executor shall not be required to give bond, and that whatever the executor might take or claim as due him should be considered as due him, without further proof, the will is conclusive upon the heirs, and they cannot maintain a bill for an accounting.—MAURAR v. BOWMAN, Ill., 48 N. E. Rep. 823.

133. WILL — Defeasable Fee.—Under a devise by a testator to his three nieces, "and, in case either of them die without issue of their bodies, the portion of such one dying to be equally divided between the survivors," each of the nieces takes the fee in her share, subject to be defeated in the event of her death without issue at any time, and not merely in the event of her death without issue during the lifetime of the testator; the rule applying to a devise over in the event of the death of a remainder-man having no application.—COLLINS v. THOMPSON, Ky., 43 S. W. Rep. 227.

134. WILLS—Estate Devised.—Under a will bequeathing property to a legatee absolutely for life, with the right to dispose of it at her death as she may deem fit, —no remainder being limited upon the property,—the legatee takes an absolute title.—IN RE MOEHRING, N. Y., 48 N. E. Rep. 818.

135. WILLS — Vested Estate — Death of Legatee.—Where a will bequeaths to each of three grandchildren a specified sum of money, "to be paid to them when each arrive at the age of 21 years," the bequest is vested, and the time of payment, only, is postponed.—MCREYNOLDS v. GRAHAM, Tenn., 43 S. W. Rep. 130.

136. WRONGFUL ATTACHMENT — Damages.—Where property which has been conveyed in trust to secure debts is wrongfully attached by other creditors, and sold by a receiver, the actual damages, if any, to the beneficiaries under the trust deed, who receive the proceeds of the sale, is the difference between what was realized by the receiver and what could have been realized by the trustee under the terms of the trust.—REEVES v. JOHN, Tenn., 43 S. W. Rep. 134.